FOREIGN AND INTERNATIONAL COMPETITION LAW AND POLICY DEVELOPMENTS

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Sport and Competition Law

There is a general view in Australia that one area of "commerce" that our courts should not get involved in is sport. After all, Australians take their sport very seriously and do not like to see it being interfered with by lawyers and others who want to "muddy the waters". They are seen as trying to argue on the interpretation of contracts or similar matters which may interfere with the pursuit by Australians of their interests in football (of which there are four specific codes played in Australia) or some other sport. Despite this wish, a number of sports including cricket and the various football codes have, however, been the subject of some interesting cases in the courts, in particular some interesting antitrust cases. The most recent, a very celebrated case which grabbed the headlines in Australia for many weeks, involved a brand of football known as Rugby League. It is often described as the professional code which broke away from the Rugby Union code (in which Canada has done very well in recent years in World Cup competitions). Rugby League is the most popular football code on the Eastern Australian seaboard and vies with Australian Rules Football as the most popular football code in Australia. The other codes — Rugby Union and Soccer are less popular.

In October 1996 the Full Federal Court handed down an important judgment which has quite significant implications for the powers of the Australian Competition & Consumer Commission and for the interpretation of our antitrust law - the *Trade Practices Act*. In particular, the decision concerns the interpretation to be given to a prohibition in the *Trade Practices Act* against primary or collective boycotts (see ss. 45(2) and 4D of the Act). Basically, a primary or collective boycott exists if two or more competitors (or would be competitors) agree (either directly or indirectly) to limit their ability to sell or acquire goods or services *from particular persons*. The legislation will be breached if a substantial purpose of the agreement (or part of the agreement) is to limit the supply or acquisition of goods or services. It is unnecessary to establish that the particular agreement (or part of the agreement) has any impact on markets or competition - the mere existence of the agreement to restrict or limit the supply or acquisition of relevant goods, etc. is sufficient. Purpose can be ascertained by reference to the surrounding circumstances rather than particular documents and as long as it is a substantial purpose it does not have to be the only or the main purpose of the agreement. The *Trade Practices Act* does not use

the word agreement in a limited sense - the definition of contracts, arrangements or understandings (the technical terms used) are very wide indeed.

News Limited & Others v. *Australian Rugby Football League Limited & Ors,*[1] arose out of an attempt by News Limited (a Rupert Murdoch company) to establish a new professional Rugby League competition in Australia to be known as Super League. It wanted to operate a national and international competition. However, for a number of years the Australian Rugby Football League, together with the New South Wales Rugby League Limited (collectively, the "League") ran a competition which was national in some senses with professional teams (twenty in all) from four States in Australia and New Zealand. News Limited and its associated companies entered into a number of contracts with 300 players and coaches during 1995 which would enable it to set up a rival competition in 1996. The League, having learned of these arrangements, entered into long term commitment and loyalty agreements with players and the twenty clubs which in effect tied them to the Rugby League and its competition rather than to the Super League competition. News Limited brought proceedings to challenge these arrangements arguing that they contravened the Act being a misuse of market power by the League (pursuant to section 46 of the Act which prohibits the misuse of market power), or alternatively that the arrangements amounted to a collective boycott. The claim by News Limited led to a counterclaim alleging that News Limited had induced breaches of contract and the League sought injunctions from the court to protect News Limited from trying to start a rival competition.

At first instance, News Limited lost all of its claims. The League was successful and Burchett J. in the Federal Court granted injunctions against News Limited until the year 2000. These in effect would have prevented News Limited from commencing its Super League competition. It also ordered damages to be assessed against News Limited and its associated companies for inducing breaches of contract. News Limited appealed the decision and the Full Federal Court upheld its appeal in relation to the provisions relating to collective boycotts. It did not have to deal with the appeal in relation to the alleged misuse of market power. At first instance, Burchett J. had held that the League did not have market power because Rugby League football was only part of a much wider market which included all the other brands of football and, indeed, many other sports.

The Full Federal Court held that the evidence made it clear that the League had responded to the initiative by News Limited and its associated companies to start a rival competition by signing up the clubs and the players to agreements for five years. Note that in the past, those commitment and loyalty agreements, which were signed by the clubs and players, were for a period of only twelve months. In the view of the Full Federal Court, the proper inference to be drawn from the evidence was that at the time the commitment and loyalty agreements were executed, the clubs were being asked to enter into separate arrangements with the rival competition the Super League which was to organize an alternative competition. The clubs were in competition with each other and to stop them all from agreeing to form the rival competition, as alleged, amounted to a collective boycott. Furthermore, players who were also involved were not employees in the strict sense of the word (which would have taken the contracts between them and the relevant clubs outside the reach of the *Trade*

Practices Act because of a specific exemption). While the court did not have to specifically make a finding on this particular issue, the inference was that they were not employees but were offering services as defined by the Act and thus would have been subject to the Act.

In reaching its conclusions the Full Federal Court criticized the trial judge's evaluation of the Rugby League clubs and the competition that they were involved in as some sort of non-commercial relationship similar to a joint venture where the parties owed fiduciary obligations to each other. The Full Federal Court ruled that this analysis was totally inappropriate and that the football clubs were engaged in major commercial ventures. They were competing for spectators, players, television and other revenue. Therefore, it was inappropriate to consider football clubs as local community organizations running social and related activities with some aspects of their arrangements being of a commercial nature.

The New South Wales and Australian Rugby Leagues sought leave to appeal this decision to the High Court of Australia (the equivalent of the Supreme Court of Canada). Special leave is required from the High Court for any appeal. The High Court rejected the application for leave to appeal.

Note

1 (1996) CCH Trade Practices Reporter, paragraph 41-521.

REGULATORY AND TRADE DEVELOPMENTS

THE INTERNATIONAL RESPONSE TO THE HELMS-BURTON AND IRAN SANCTIONS ACTS

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In an attempt to further isolate and dislodge what it considers to be "rogue" regimes, the United States Government recently expanded the reach of its economic sanctions on Cuba, Iran and Libya. After intense pressure from Congressional forces and from the politically active Cuban-American community, President Bill Clinton, on March 12, 1996, signed the Cuban Liberty and Democratic Solidarity Act of 1996 ("Helms-Burton Act") expanding the thirty year old trade embargo against Castro's Cuba. In early August 1996, the action against Cuba was followed by President Clinton signing the Iran and Libya Sanctions Act of 1996 ("Iran Sanctions Act"), sponsored by Republican Senator Alfonse D'Amato. The purpose of these new sanctions laws is to intensify the economic leverage against enemies of the U.S. in an attempt to foster their political liberalization, since prior measures have failed to bring about any tangible change.

Despite the noble goals outlined by the U.S. regarding the new sanctions laws (restoration of democracy, improving economic well-being through market forces, etc.), many of the United States' closest allies feel that these new laws violate their sovereignty and international law. The European Union ("EU"), Canada, Mexico and many other U.S. allies and economic partners contend that the economic impact of the new sanctions laws will fall on them, despite the fact that the targets of the sanctions are Cuba, Iran and Libya. This article will outline the major provisions of both the Helms-Burton Act and the Iran Sanctions Act and describe the variety of retaliatory measures being planned by America's allies to deal with what they consider the extraterritorial application of U.S. law.

Overview of the Helms-Burton Act

The Helms-Burton Act, named after the legislators who sponsored the law, is designed to cut off foreign investment in Cuba in order to depose Cuban dictator Fidel Castro. Since the collapse of the Soviet Union, Cuba's Cold War patron, Havana has increasingly been willing to allow foreign companies to invest in state-owned Cuban industries and businesses. Since American companies are prohibited from conducting business in Cuba due to the trade embargo established by the Foreign Assistance Act of 1961, most of the foreign investment in Cuba has come from Europe, Canada and Mexico. The Helms-Burton Act seeks to target the sources of this foreign investment by expanding the ability of Americans to sue for damages stemming from property losses due to Cuban expropriation.

Title III of the Helms-Burton Act makes corporations and individuals who "traffic" in confiscated American property in Cuba liable for civil damages in U.S. courts. U.S. nationals, including naturalized Cuban-Americans, who have a claim to property confiscated by the Castro regime in the early 1960s, can sue those who now are trafficking in such confiscated property. Trafficking is defined to include selling, transferring, distributing, dispensing, brokering, managing, purchasing, leasing, possessing or controlling confiscated property; or engaging in a commercial activity using confiscated property; or causing, directing, participating in or profiting from trafficking in confiscated property. In an effort to quell the storm surrounding the implementation of Title III, President Clinton exercised his authority to temporarily waive enforcement of Title III on July 16, 1996. The waiver suspends the private right of action (but not the accrual of liability) against those trafficking in confiscated U.S. property until February 1, 1997.

The second controversial provision of the Helms-Burton Act is Title IV which allows the U.S. Department of State to suspend travel visas for executives of foreign companies (and their immediate families) that have been determined to be trafficking in expropriated U.S. property. Canada's Sherritt International Corp. and Mexico's Gropo Domos have been sent letters by the State Department warning them to either divest their interests in confiscated property in Cuba or have their executives, board members and major shareholders be denied entry into the United States.[1]

Overview of the Iran Sanctions Act

The purpose of the Iran Sanctions Act is similar to that of the Helms-Burton legislation in that it seeks to curb foreign investment in countries that are "enemies" of the United States. The Iran Sanctions Act requires (unless a national security waiver is warranted) the President to impose sanctions against foreign companies that invest more than US$40 million in the oil and natural gas industries of either Iran or Libya. The sanctions can include bans on trade and financial transactions with the United States.

Reaction to U.S. Sanctions

The EU and Canada have lead the campaign against both the Helms-Burton Act and the Iran Sanctions Act. The EU, in its annual report on trade with the U.S., went so far as to call extraterritorial application of domestic legislation the greatest barrier to trade with the United States. There are three policy measures being enacted or considered to counter the effects of the new U.S. sanctions laws: 1) domestic blocking legislation; 2) a challenge at the World Trade Organization ("WTO") Dispute Settlement Body; and 3) for Canada and Mexico, a challenge under a North American Free Trade Agreement dispute settlement panel.

Blocking Legislation

Canada, Mexico and the EU have begun to challenge the new U.S. sanctions by implementing so-called blocking legislation — preventing their companies from complying with the Helms-Burton or Iran Sanctions Acts.

On July 24, 1996, the European Commission passed an EU-wide regulation designed to prevent companies in any EU member state from complying with the provisions of the Helms-Burton Act and other extraterritorial measures. The major provisions of the regulation include:

- preventing the enforcement and collection of damages, in EU member states, stemming from litigation brought under extraterritorial measures of third countries;

- giving member governments the power to force EU citizens not to comply with the requirements or provisions of extraterritorial measures and the power to prohibit compliance with requests for information and commercial documents by overseas authorities;

- enacting a "claw-back" provision that allows EU companies or individuals to counter-sue an overseas plaintiff in European courts for damages awarded in a proceeding brought under an extraterritorial law.

Despite some disagreement among member states over certain provisions of the retaliatory legislation, the EU has been firm in its commitment to make the strongest statement possible to illustrate its opposition to U.S. sanctions policy. The Commission has proposed further amendments to the legislation to incorporate retaliatory measures against the Iran Sanctions Act. The EU is concerned about the potential economic impact of the Iran Sanctions Act since member states import about 20 percent of their oil from Iran and Libya. In fact, the Council of Ministers recently agreed to continue with the implementation of blocking legislation.

Canada shares the EU's resolve to demonstrate its displeasure with the Helms-Burton and Iran Sanctions Acts. The Canadian Parliament recently passed amendments to the Foreign Extraterritorial Measures Act ("FEMA") that would grant Canadian companies the right to counter-sue for compensation for any damages awarded under the Helms-Burton Act and prevents Canadian companies and individuals from complying with the provisions of "objectionable foreign laws".

The proposed amendments also increase the penalties for compliance with any objectionable foreign law from the current $7,300 or five years in prison to $1.1 million for corporations and $109,500 or five years in prison for individuals. The hefty increase in fines for violating FEMA could have the potential of creating a no-win situation for Canadian businesses. If they choose to divest investment in Cuba to avoid potential Helms-Burton Act litigation and losses in the U.S., they could face fines in Canada for appearing to be influenced by the U.S. sanctions legislation. Such implementation difficulties have spurred some debate that the blocking legislation will be ineffective at preventing U.S. sanctions laws from influencing Canadian business practices abroad.

Mexico has followed the EU and Canada in drafting legislation aimed at preventing domestic entities from complying with the Helms-Burton and Iran Sanctions Acts. The Mexican Senate unanimously passed the Law to Protect Trade and Investment from International Standards Violating International Law on September 19, 1996. The law would fine Mexican companies up to US$300,000 for complying with the sanctions laws of a foreign government. Fines can also be imposed for submitting information to U.S. courts in conjunction with any lawsuits brought under the Helms-Burton Act.

Challenge at the WTO

In addition to the blocking legislation being proposed, the European Council of Ministers has agreed to ask the WTO to rule on the Helms-Burton Act. It

has been said that the EU would argue that the Helms-Burton Act violates the United States' commitments under the GATT and the General Agreement on Trade in Services ("GATS"). The EU contends that the trade provisions of the Helms-Burton Act constrain European trade relations with Cuba, in violation of WTO rules. Additionally, the Europeans argue that the visa provision of the Act violate the free movement of business persons provisions of the GATS.

The EU requested formal consultations within the WTO in May 1996 and recently decided to continue its challenge to the Helms-Burton Act at the WTO. The United States has said that it feels that the WTO is not an appropriate venue for mediating the dispute over the sanctions laws because the disagreement is a political policy difference and not a trade dispute. In the event that a dispute panel is established, the Clinton Administration has stated that it could invoke an Article XXI national security exemption under GATT.

NAFTA Dispute Settlement Panel Challenge

Canada and Mexico have discussed requesting a dispute settlement panel under NAFTA in an attempt to resolve the sanctions problems with the United States. One of the arguments that the NAFTA partners could make is that the Helms-Burton Act visa restrictions are a violation of Chapter 16 of NAFTA which provides for the temporary entry of business persons between NAFTA countries. The U.S., however, could invoke Article 2101 of NAFTA which provides for national security exemptions similar to the exemptions the U.S. could use under the WTO.

U.S. Response and Conclusions

The U.S. appears to be putting as much effort into trying to convince our allies to support the Helms-Burton and Iran Sanctions Acts as it has in implementing the provisions of the sanctions themselves. President Clinton designated Undersecretary of Commerce for International Trade Stuart Eizenstat as his envoy to explain the provisions of the new sanctions and seek consensus with America's trading partners on both sides of the Atlantic. Although there have been high level meetings to discuss the new sanctions, the European Union, Canada and Mexico do not seem to be convinced that they should change their policy of challenging the extraterritorial laws of the United States. The EU, which originally indicated it would hold off on any retaliatory measures until after the U.S. presidential elections in November, decided to proceed with its challenge at the WTO in early October.

It appears that the tensions between the United States and its trading partners regarding the new sanctions laws will not diminish any time soon. The political situation in the U.S. precludes a complete waiver of the most controversial provisions of the Helms-Burton Act (at least until after the presidential election). In addition, the EU and Canada are determined to send a clear message to the U.S. that the enactment of extraterritorial legislation that hinders the commerce of Europeans and Canadians is not an acceptable U.S. foreign policy.

Note

1 For additional commentary on the Helms-Burton Act, see Stuart E. Benson, William M. McGlone and John E. Davis, "Dramatic Expansion of U.S. Sanctions Against Cuba Raises Host of New Issues for U.S. and Foreign Companies" (1996) 17:1 Can. Comp. Rec. 24.